Nos. 83-321 & 83-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

CLARENCE COLE, *et al.*,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

On Writs Of Certiorari to the Supreme Court of the State of Georgia

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. The State Has Failed To Justify the Closure Order Entered Below.

1. The State's attempt to justify the closure order entered below is completely unpersuasive, resting almost entirely on the assertion that closure was required under O.C.G.A. § 16-11-64(b)(8). The Georgia Supreme Court, as petitioners have noted, expressly *declined* to decide whether that statute required

closure. (*See* Pet. Brief at 7, *quoting* J.A. 23a.) There was no finding by the Georgia Supreme Court that § 16-11-64(b)(8) even authorized, much less required, closure in the circumstances of this case.[1]

The State's only other justification for closure is the trial court's supposed "balancing" of the "various concerns" that the State now suggests were involved. (*See* Ga. Brief at 20.) But the trial court balanced nothing. In ordering closure, it relied exclusively on § 16-11-64(b)(8); it was the Georgia Supreme Court that offered the *post hoc* rationalization for closure on which the State now relies. Nothing in the record supports the State's claim that closure was necessary "to preserve order and decorum in the courtroom and to protect the rights of parties involved in the case." (Ga. Brief at 20.) The trial court itself did not find, and on this record could not have found, that any such interests required closure.

2. The United States concedes that petitioners' objections to the trial court's closure order "may be well taken." (U.S. Brief at 18 n.14.) But it asserts that a new trial is not an "appropriate" remedy and that petitioners are "at most . . . entitled to a new, public suppression hearing," to be followed by a new trial only if the second suppression hearing "reaches a different result from the first one." (*Id.* at 21 n.14.) It should be obvious, however, that this proposed "remedy" is in fact no remedy at all. The trial court on remand would have enormous incentive to rule against the petitioners on their motion to suppress, regardless of the merits of their claims; the hearing on

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[1] The entire seven-day suppression hearing was closed, not simply the two-and-one-half hours during which the State played its tapes. Moreover, as petitioners noted at p. 20 n.28 of their brief, even if § 16-11-64(b)(8) were construed to disable the prosecution from later using wiretap evidence because it had been presented in an open suppression hearing, that fact would not by itself give rise to a state "interest" justifying closure, for a state law in effect requiring closure to facilitate future prosecutions would itself have to be measured against the Constitution's guarantees of openness. The Georgia Supreme Court did not decide, however, that § 16-11-64(b)(8) required closure in this case and thus the issue of whether, so construed and applied, that statute is constitutional is not before this Court. The State, while relying on § 16-11-64(b)(8), simply assumes its constitutionality; petitioners, on the other hand, submit that the State's reliance on the statute is wholly misplaced. (*See also* Pet. Brief at 6 n.8.)

remand would thus be reduced to a *pro forma* ratification of the prior adverse decision. Where, as here, a suppression hearing has been improperly closed, no means short of vacating the defendant's conviction and remanding for public proceedings can redress the violation of his rights. *See United States* v. *Ruiz-Estrella*, 481 F.2d 723, 725-26 (2d Cir. 1973).[2]

Moreover, like discrimination in the selection of a grand jury, denial of a defendant's right to public criminal proceedings "strikes at the fundamental values of our judicial system and our society as a whole." *Rose* v. *Mitchell*, 443 U.S. 545, 556 (1979). *See Press-Enterprise Co.* v. *Superior Court*, 104 S. Ct. 819, 822-24 (1984). When a defendant demonstrates discrimination in the selection of the grand jury, the remedy is not to set aside his conviction only if a new grand jury, properly constituted, does not indict him a second time: "[W]here sufficient proof of discrimination . . . has been made out and not rebutted, this Court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed." 443 U.S. at 551. The same rule should apply when a suppression hearing has been improperly closed.[3]

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[2] Apart from its manifest inefficacy, the remedy suggested by the United States is premised on the mistaken assumption that a defendant whose public trial rights have been violated is entitled to a new trial only if he can demonstrate prejudice—here, that his motion to suppress would have been granted if the hearing had been open. Yet it has long been "the settled rule of the federal courts that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings." *Levine* v. *United States*, 362 U.S. 610, 627 n.* (1960) (Brennan, J., dissenting on other grounds). *See, e.g., Tanksley* v. *United States*, 145 F.2d 58, 59 (9th Cir. 1944). *See also Douglas* v. *Wainwright*, 714 F.2d 1532, 1542 (11th Cir. 1983) (*dictum*), *cross-petitions for certiorari filed*, Nos. 83-817 & 83-995.

[3] Petitioners submit that the Third Circuit erred in failing to set aside the defendant's conviction in *United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 608-09 (3d Cir. 1969) (*en banc*). The court there held that the proper remedy for a state trial court's denial of a public *Jackson* v. *Denno* hearing was a new, public hearing, to be followed by a new trial (or dismissal of the indictment) only if the new hearing resulted in a finding that the defendant's confession was not admissible. In so holding, the court mechanically applied this Court's remedy for an inadequate hearing on the voluntariness of a defendant's confession, *see Jackson* v. *Denno*, 378 U.S. 368, 391-96 (1964), and did not consider whether vindication of the Constitution's guarantees of openness required that the defendant's conviction be set aside.

II. The State Has Failed To Justify Its Forfeiture Statute

Neither the State nor any of the *amici* has answered petitioners' fundamental challenge to O.C.G.A. § 16-14-7(f) —that its probable cause requirement is purely nominal, inadequate to safeguard against wholesale seizures such as occurred here. Although, as the United States observes, property seized without genuine probable cause "can be returned" (U.S. Brief at 9), the statute remains an open invitation to wholesale seizures. So long as literally everything in a person's home *might* be "property subject to forfeiture," § 16-14-7(f) offers no protection against seizures without probable cause.[4]

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[4] Although the United States suggests that the constitutionality of § 16-14-7(f) is not properly before the Court, the fact is that the Georgia Supreme Court specifically held the statute valid "as applied" to the petitioners (J.A. 21a), and one of the State's agents testified at trial that at least some property was seized pursuant to the statute, and not the warrants. (*See* Pet. Brief at 24 n.32.)

The United States also errs in asserting that "it is not contested that the search warrants were valid" (U.S. Brief at 16), for petitioners attacked the validity of the warrants in the trial court, asserting, *inter alia*, that the warrants were a pretext for general searches and wholesale seizures (*see, e.g.*, S.T. 638) (attacking motive of State agents executing warrants). In the Georgia Supreme Court, petitioners explicitly argued that the warrants had been executed in bad faith as part of a pre-search plan to search for and seize anything that the executing officers, in their sole and unbridled discretion, felt might be evidence of assets against which forfeiture actions might be brought. (*See* Pet. Brief at 28 n.42.) As petitioners have noted, the trial court flatly refused to pass on the validity of the warrants (*see id.* at 9), and the Georgia Supreme Court also avoided the issue. Thus, the United States has no cause to wonder "on what grounds [the courts below] could possibly have held that the search warrants were invalid." (U.S. Brief at 8 n.3.)

Because the trial court refused to pass on the validity either of the warrants or of the searches and seizures undertaken by the police (*see, e.g.*, S.T. 624-25), petitioners cannot say with precision which places searched, or which things seized, were outside the scope of the warrants. Nor is it possible, for the same reason, for petitioners to point to particular evidence improperly admitted against them at trial. Absent a determination by the trial court as to the validity and proper scope of the warrants, petitioners are unable to particularize such errors, except to reiterate their claim, not passed upon by the courts below, that the warrants themselves were invalid. Petitioners note that theirs was among the property indiscriminately seized by the police. (*See, e.g.*, S.T. 644-48.)

For these reasons, petitioners submit that they are entitled, at a minimum, to an order vacating the judgment below and remanding for an

(footnote continues)

Only last Term this Court held facial invalidation to be appropriate even when a state law, challenged as impermissibly vague on its face, admits of some constitutional applications. *Kolender* v. *Lawson,* 103 S. Ct. 1855, 1858-59 & n.8 (1983); *see id.* at 1865-66 (White, J., dissenting). In striking down the law, the Court stressed that it flouted "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 1858. A law telling police that they may seize anything in a person's home so long as they follow the law—which in effect is what § 16-14-7(f) says—does not satisfy that requirement, and must inevitable produce abuses such as those here. If "property subject to forfeiture" is to be so broadly defined, it is constitutionally imperative to interpose a magistrate's determination, based on *genuine* probable cause, to assure that seizures under Georgia's RICO statute remain within constitutional bounds. (*See* Pet. Brief at 27.)[5]

Much as the United States may wish to minimize the severity of the erroneous deprivations of property encouraged by the statute (U.S. Brief at 9), such deprivations violate not only the Fourth Amendment but also due process, *see, e.g., Fuentes* v. *Shevin,* 407 U.S. 67, 88-90 (1972); *Sniadach* v.

(footnote continued)

assessment of their claim that the warrants, the entry, and any seizures pursuant to the warrants, were—even apart from those pursuant to the RICO statute—invalid. (*See* Pet. Brief at 24.) The United States itself suggests such a course. (U.S. Brief at 21.) The trial court's refusal to pass upon petitioners' challenges is, of course, fairly subsumed under the questions presented in the petitions for certiorari and is, in any event, subject to review as plain error. *See, e.g., Washington* v. *Davis,* 426 U.S. 229, 238 & n.9 (1976); *Procunier* v. *Navarette,* 434 U.S. 555, 559-60 n.6 (1978).

[5] It is precisely because, under certain circumstances, "all property" belonging to a person is subject to levy to satisfy a federal tax deficiency that this Court found no problem with certain of the warrantless seizures in *G.M. Leasing Corp.* v. *United States,* 429 U.S. 338, 349-51 (1977), cited by the United States at pp. 5 & 13 of its brief. Nothing about such property need be "suspicious" to permit warrantless seizure; there need only be probable cause to believe that it *belongs* to the taxpayer. By contrast, it is the association of property with "a pattern of racketeering activity" that alone renders it subject to forfeiture under O.C.G.A. § 16-14-7(a), and petitioners submit that police are simply incapable of determining whether or not otherwise innocent property has some association with "a pattern of racketeering activity" so as to permit warrantless seizure. (*See* Pet. Brief at 24-27.)

Family Finance Corp., 395 U.S. 337, 342 (1969); *id.* at 342-43 (Harlan, J., concurring), and they can scarcely be justified by the possibility that *other* violations constitutional rights could be *worse*. (*See* U.S. Brief at 9-11.)[6]

III. The State Has Failed To Show That Everything Seized Should Not Have Been Suppressed

The record shows clearly that the agents who raided petitioners' homes *treated* the warrants under which they acted (or the warrants in combination with the statute) as *general* warrants. This is not a situation in which, as the United States suggests, application of a rule mandating suppression of everything seized would "penalize an error in the execution of a warrant." (U.S. Brief at 16.) Here the trial court specifically found that the State's agents "just went in and took everything that was in sight." (S.T. 638.) The agents themselves admitted that they ignored the warrants' description of the things to be seized. (*See* Pet. Brief at 3 n.3.) If ever there were a case in which "the police did not confine their search in good faith to the objects of the warrants" (U.S. Brief at 17), this is it. Suppression of everything that was seized is therefore the appropriate remedy, as the Ninth Circuit held on similar facts in *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978)—a case that neither the State nor any of the *amici* elected to address.

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[6] Contrary to the suggestion of the United States at pp. 16-18 of its brief, petitioners vigorously dispute the lawfulness of the searches undertaken by the police, inasmuch as petitioners contest the validity of the underlying warrants. (*See* p. 4 n.4, above.) Moreover, the United States is incorrect in claiming that this Court has "unequivocally held that due process does not require a pre-seizure hearing when the government seizes items subject to forfeiture." (U.S. Brief at 14.) To the contrary, as petitioners noted in their brief at p. 28 & n.41, this Court in *Calero-Toledo* made clear that, absent an "extraordinary" situation, notice and hearing *are* required for seizure even of property used for unlawful purposes. *See* 416 U.S. at 680. In *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars*, 103 S. Ct. 2005 (1983), the Court reaffirmed the *Calero-Toledo* test. *Id.* at 2011 n.12. Petitioners submit that O.C.G.A. § 16-14-7(f) is not limited to seizures made in "extraordinary situations," and that its requirement that an officer seizing "property subject to forfeiture" have probable cause to believe that the property will be "lost or destroyed if not seized" is a purely nominal protection, which cannot save the statute from facial invalidation. (*See* Pet. Brief at 28.)

CONCLUSION

For the foregoing reasons, and for the reasons stated in their principal brief, the convictions of the petitioners should be set aside.

Respectfully submitted,

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